Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

REPLY COMMENTS OF THE ENTERPRISE COMMUNICATIONS ASSOCIATION

The Enterprise Communications Association ("ECA"), by and through its attorneys, hereby submits these Reply Comments in response to the Commission's Notice of Proposed Rulemaking ("*NPRM*") in the above-referenced proceeding.[1] In these Reply Comments, ECA will address one issue: the need for the Commission to take the steps necessary to ensure the development of competition and its attendant benefits in the market for IP-based products and services targeted to small- and medium-sized enterprise customers.

The Commission has long acknowledged the need to foster competition in newly or nascently competitive markets. In its *Computer II Final Decision*,[2] the Commission recognized the beneficial effects of competition in the then-emerging market for customer premises equipment ("CPE"), and in particular, the important role played by independent equipment suppliers. The Commission observed that "competition. . . stimulate[s] innovation on the part of both independent suppliers and telephone companies, thereby affording the public a wider range

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1 *In re IP-Enabled Services,* Notice of Proposed Rulemaking, FCC 04-28 (Mar.10, 2004) (deadline for reply comments extended to July 14, 2004 in DA 04-1685 (June 9, 2004)).

2 *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 (1980).

of terminal choices at lower costs,"[3] and that independent equipment vendors had been "instrumental in applying computer technology to CPE . . . [and were] the primary leaders in innovation in this area."[4]

While the Commission observed that the CPE market faced an increasing amount of competition in 1980, the Commission also recognized that competition in this market was only beginning to emerge, and that the provision of CPE by the bottleneck telephone companies posed a threat to that competition. In particular, the Commission found that the carriers' practice of providing CPE to customers as part of a bundled package of CPE and transmission services could force customers to purchase unwanted CPE in order to obtain necessary services, thereby restricting customer choice and retarding the competitive development of the CPE market.[5]

The Commission already had in place provisions ensuring standardized interfaces to the network to ensure full interoperability between CPE and the carrier networks,[6] a core predicate for the emergence of a robust, competitive CPE market. The Commission responded to the competitive threat of bundling by requiring carriers to separate the provision of unregulated CPE from the provision of telecommunications services. Further, the Commission required that all regulated services provided by a telephone company to an "affiliated" unregulated provider of CPE be recorded on the books of the regulated telephone company at the tariffed rates for the service, regardless of whether the unregulated marketing arm of the ILEC was a separate

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3 *Computer II Final Decision* at 439, ¶ 141.

4 *Computer II Final Decision* at 440, ¶ 144.

5 *Computer II Final Decision* at 442-443, ¶¶ 149-150.

6 *See Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS,* First Report and Order, 56 F.C.C.2d 593 (1975) and Second Report and Order, 58 F.C.C.2d 736 (1976), *aff'd sub nom. North Carolina Utilities Commission v. FCC,* 552 F.2d 1036 (4th Cir. 1977), *cert. denied* 434 U.S. 874 (1977).

subsidiary or an "accounting entity," or whether the services were marketed by shared personnel or on a "joint basis."

These restrictions on bundling remained in place until 2001, when the FCC recognized that the market for traditional CPE had become truly competitive. Customers can select products from a broad range of CPE manufacturers and distributors that freely connect on a standardized basis to the network. There exists a viable market of customers purchasing CPE from alternative channels representing the full range of CPE manufacturers. Thus the bundling restriction was no longer necessary to protect competition in the traditional CPE market.[7]

The market for IP-enabled systems today is in many respects similar to the market for traditional CPE in 1980. As ECA noted in its Comments, the IP-enabled systems market is still very much in its formative stages. Independent IP-enabled system manufacturers and their distribution channels as well as system integrators are playing key roles in driving innovation in IP-enabled services and applications, just as CPE manufacturers and their distribution channel partners did at the time of the Commission's *Computer II Final Decision*. Competition is emerging in the shadow of bottleneck facilities-based providers of the network services required to optimize use of enterprise systems – service providers who are free to provide the same systems as the independent providers of enterprise systems. One difference between today's market and the traditional CPE market is that in the IP-enabled equipment market, there are no standards guaranteeing interoperability between IP-enabled systems and equipment and the carrier networks.[8]

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7 *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Report and Order, 16 FCC Rcd 7418 (2001).

8 As ECA discussed in its initial comments in this proceeding, the independent IP-enabled system integrator is also potentially subject to interconnection discrimination because there are not yet prescribed standards for the network interface and the ILECs could specify an interface standard that is proprietary to the product of a chosen partner. By the

The competition that is just beginning to emerge could still give way under the weight of dominant players. There is a trend toward bundled equipment and service offerings. That trend – at least in the case of market-dominating players – could create a drag on the development of a truly competitive market. There is the very real danger that with ILECs able to form alliances with, and bundle the equipment of, a handful of chosen manufacturers, other players will functionally be denied access to the ILECs' network facilities. There is pressure on IP-based system manufacturers and their distribution channel partners to align themselves with bottleneck providers of the network facilities necessary to reach enterprise customers.

The tendency of dominant service providers to bundle and sell their services with equipment provided by a few chosen manufacturers of IP-enabled systems is a cause for concern, particularly for smaller, independent IP-enabled system integrators and IP-enabled system manufacturers. These smaller providers tend to have less leverage with the bottleneck providers and thus are less likely to be able to offer a similar bundle of IP-enabled systems and ILEC services to the public at a competitive price. To the extent that the ILECs are major players in the market for IP-enabled services – a reasonable expectation, given the ILECs' control of critical network facilities – their alliances with larger IP-enabled equipment manufacturers may leave the independent system integrator (who will address the small and medium enterprise market as a matter of first priority) without the ability to sustain itself in the market.

If the public is to reap the benefits from competition in the market for IP-based products and systems, several issues must be addressed, including interface and protocol standards. While all parties – and their customers – would benefit from such standardization, it is most critical for

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time of its *Computer II Inquiry Final Decision,* the Commission had already addressed this problem by prescribing and standardizing the conditions for CPE interconnection to the network in Part 68 of its rules. See note 6*, supra.*

independent manufacturers and their distribution channels, who otherwise could be frozen out of the market as a result of strategic alliances formed by the ILECs and their chosen manufacturers.

The Commission must take steps to ensure that the independent IP-enabled manufacturers and their channel partners and systems integrators are able to survive and thrive, and thus that competition flourishes in this nascent market. The Commission must act to preserve the conditions that will allow competition to grow and prevent competitive abuses from occurring. ECA believes the Commission should adopt bundling prohibitions analogous to the *Computer II Final Decision* safeguards. These safeguards should include the requirement that the LECs impute to its regulated business the tariffed or other rates it charges an arms-length customer to purchase a service whenever the LEC's affiliated IP-enabled service provider takes that same service from the LEC.

Moreover, concerns about the impact of bundling IP-enabled systems and services on competition in the nascent IP-enabled system market highlight the need for the Commission to proceed carefully and cautiously in declaring the ILECs to be unregulated in their provision of IP-enabled services. The dominant market power of the ILECs, achieved through their control of bottleneck facilities, gives these carriers the means to engage in behavior that can impede the development of competition in the IP-enabled services market, such as denying access to essential facilities or employing proprietary standards in their networks.[9] If the Commission declares IP-enabled service to be unregulated (either because it is an information service or the Commission forebears from regulation), it arguably lacks authority to continue to regulate the bundling of the service with the unregulated customer premises system. ECA believes there are

[9] *See* note 8, *supra,* and accompanying text.

a number of ways, such as combinations of the Commission's forbearance authority and Title 1 jurisdiction, for the Commission to exercise its authority over bundling in these circumstances.

ECA recognizes that the imposition of bundling prohibitions may seem to run counter to the Commission's current deregulatory disposition. In general, ECA shares the Commission's bias in favor of letting markets operate freely once competitive conditions are established. Thus, ECA does not necessarily disagree with the Commission's decision to do away with prohibitions on bundling in the traditional CPE market. But as we have pointed out, that decision was taken only after the provision of traditional CPE had been totally deregulated for almost twenty years, and there was a mature, vibrantly competitive market where standardized network interface standards were long established. In that respect, the state of the traditional CPE market in 1980 stands in sharp contrast to the nascent state of the IP-enabled systems market today, where there are as yet no established standards and where the Commission did impose bundling prohibitions. The NPRM proposed no specific safeguards to preserve and allow the emergence of a competitive IP-enabled systems market, and indeed did not specifically address the issue of the competitiveness of the IP-enabled systems market. In this context, and given the potential and promise of a competition driven IP-enabled systems market, as contrasted with the potential loss of consumer benefit if the market is not allowed to grow and thrive, ECA believes the Commission must look to measures that have shown their historical efficacy.

WHEREFORE, the Commission should take steps to ensure the competitive vitality of the IP-enabled systems market for independent manufacturers of IP-enabled systems and their channel partners and act in accordance with the relief requested in these Reply Comments.

Respectfully submitted,

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